[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 116

[redacted]

As owner of the Steamer Frank Armstrong,

Petitioner,

vs.

THE INTERLAKE STEAMSHIP COMPANY,

As owner of the Steamer Frank Armstrong,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

[redacted]

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Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. 116.

AMERICAN STEAMSHIP COMPANY,
As owner of the Steamer JOHN J. BOLAND,
Petitioner,

vs.

THE INTERLAKE STEAMSHIP COMPANY,
As owner of the Steamer FRANK ARMSTRONG,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the Court of Appeals (R. 603-609) is reported at 194 F. (2d) 25. Denial of petitioner's petition to the Court of Appeals for rehearing (R. 629) was without opinion. The opinion of the District Court (R. 567-572) is unofficially reported at 1950 A. M. C. 1678. The Findings of Fact and Conclusions of Law of the District Court (R. 573-575) are not reported.

JURISDICTION.

The petition for a writ of certiorari is invoked under 28 U. S. C. Sec. 1254(1).

QUESTION PRESENTED.

Simply stated the question presented is: Whether the District Court and the Court of Appeals erred in finding petitioner and respondent equally at fault for the collision occurring between their vessels.

STATUTES AND REGULATIONS INVOLVED.

The case is governed by the Pilot Rules for Navigation of Vessels on the Great Lakes, 33 U. S. C. Sections 241-294 and by the U. S. Inspector's Regulations for the Great Lakes, 33 C. F. R. Part 322.

Pilot Rule 15, 33 U. S. C. Sec. 272 provides as follows:

"Every vessel shall, in thick weather, by reason of fog, mist, falling snow, heavy rain storms, or other causes, go at moderate speed. A steam vessel hearing, apparently not more than four points from right ahead, the fog signal of another vessel shall at once reduce her speed to bare steerageway, and navigate with caution until the vessels shall have passed each other."

Pilot Rule 26, 33 U. S. C. Sec. 291 provides as follows:

"If the pilot of a steam vessel to which a passing signal is sounded deems it unsafe to accept and assent to said signal, he shall not sound a cross signal; but in that case, and in every case where the pilot of one steamer fails to understand the course or intention of an approaching steamer, whether from signals being given or answered erroneously, or from other causes, the pilot of such steamer so receiving the first passing signal, or the pilot so in doubt, shall sound several short and rapid blasts of the whistle; and if the vessels shall have approached within half a mile of each other both shall reduce their speed to bare steerageway, and, if necessary, stop and reverse."

Pilot Rule 28, 33 U. S. C. Sec. 293 provides:

"Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of a neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

STATEMENT.

1. Nature of Case.

This admiralty cause concerns a maritime collision which occurred in a dense low lying fog on the early morning of November 2, 1948 (shortly after midnight of November 1), in the open waters at the westerly end of Lake Erie, north of the International Boundary Line between Pelee Passage Light (also known as Middle Ground Shoal) and Colchester Reef, a stretch of 17 miles, where petitioner's Steamer JOHN J. BOLAND, westbound, without cargo, on a voyage from Lorain to Toledo, Ohio, collided with respondents eastbound Steamer FRANK ARMSTRONG, laden with iron ore, on a voyage from Superior, Wisconsin to Erie, Pennsylvania.

The stretch of water between Pelee Passage Light and Colchester Reef is shown in the enlargement of U. S. Survey Chart identified as Libelant's Exhibit 6.

2. The Version of the Occurrence as Related by Witnesses on the BOLAND.

Petitioner has failed to set forth a statement of the evidence from the BOLAND. Such a statement is essential to a valid consideration of the question presented and, therefore, as briefly as possible, respondent presents the following summary of the BOLAND's testimony:

The BOLAND, eastbound, was sounding fog signals regularly and a few minutes after passing Pelee Passage Light, or Middle Ground, she checked to half speed on hearing the whistle of an approaching steamer (R. 333, 401), later identified as the Steamer ISAAC L. ELLWOOD (R. 346).

The BOLAND exchanged a one blast passing signal with the ELLWOOD and passed her port to port about two ship lengths off (R. 334) or about 1000′ (R. 366,367).

At about 11:36 P. M. the BOLAND heard the ELLWOOD call the ARMSTRONG, which was astern of her, and report that the ELLWOOD had met four upbound vessels and the ARMSTRONG replied that she had them in her scope (R. 334), which indicated to the BOLAND that the ARMSTRONG was downbound from the Detroit River to Middle Ground (R. 334, 402).

The BOLAND heard continuous fog signals from the approaching vessel (the ARMSTRONG) sounding at first 1½ points on the starboard bow (R. 336, 362, 372, 403) and the angle widened (R. 336, 341). However, a bearing cannot be determined absolutely in fog (R. 372) because fog is deceiving (R. 454). The BOLAND states that she did not hear any one blast passing signals from the ARMSTRONG (R. 342, 488). The BOLAND continued blowing her fog signal (R. 337) and then saw the beam of a searchlight bearing about 2 points or better (R. 363, 461) on her starboard bow. The 2nd Mate then turned on the BOLAND'S searchlight which had not been burning theretofore (R. 456, 469).

The BOLAND blew a two blast signal (R. 336), which she claims was answered by the ARMSTRONG (R. 336-337, 362, 465).

Fog signals from the ARMSTRONG were heard continuously (R. 362). The BOLAND blew more fog signals (R. 363), but did not check to bare steerageway (R. 363), which on the BOLAND was approximately three miles per hour (R. 374). Further, the BOLAND did not know the course or speed of the ARMSTRONG (R. 370).

The watchman on the BOLAND saw the lights of a ship ahead bearing 4 points on the starboard bow and reported it (R. 461). From the time the BOLAND had passed the ELLWOOD until the searchlight was observed, the BOLAND blew no whistle signals other than fog signals (R. 461-462, 470).

The Captain of the BOLAND knew that Pilot Rule 15 (33 U. S. C. Sec. 272) requires a vessel hearing another vessel approaching within 4 points of her bow to check to bare steerageway; he did not do so (R. 370).

Two or three minutes after the first exchange of two blasts the BOLAND blew a second two blast passing signal (R. 362, 363) which was answered (R. 362, 462). At that time the BOLAND was not sure of the course of the ARMSTRONG or her distance off (R. 375), but the Captain said: "Thank God, we are by him" (R. 487). The searchlight was then 3 to 4 points on the starboard bow (R. 487).

About two minutes later the BOLAND blew a third set of two blasts (R. 337, 364), which was not answered (R. 337, 462).

At this time, shortly after midnight, the lookout on the forecastle was changed (R. 377, 462, 465, 493), and a short time previously the 3rd mate had been relieved by the 2nd mate (R. 369, 455).

Then, seeing the beam of the searchlight and red light of the vessel close ahead on the starboard bow (R. 337, 338, 373) bearing 45° (R. 365) or more (R. 487), the wheel of the BOLAND was ordered hard left and the engine was put full speed astern (R. 337, 457, 487). It was then too late to try to go to the right to pass under the stern of the ARMSTRONG (R. 373), there was not time for the rudder to take effect and the collision happened seconds thereafter (R. 338, 457, 488).

The BOLAND never sounded a danger signal (R. 365, 457, 484) and she was not stopped before she reached the ARMSTRONG (R. 371).

The steering and communication systems of the BOLAND were disabled (R. 338), however, there was no quick settling of her forward end after the collision. It was not enough to be noticeable within one half hour (R. 415).

Later the Steamer J. P. WELLS (R. 339, 378) and then the LESLIE came alongside (R. 340) and the latter vessel took the BOLAND to Toledo (R. 223, 340).

3. Counter-Statement of Facts as Related by the ARMSTRONG.

In a number of important respects respondent finds it impossible to accept petitioner's statement as to the evidence of the ARMSTRONG and rather than to undertake a piece-meal acceptance and rejection thereof, respondent deems it advisable to make the following counter-statement:

While petitioner does state that the ARMSTRONG was equipped with radar, it makes no mention of the fact that the ARMSTRONG'S radar was not operating dependably despite the fact that mechanics had been aboard several times prior to November 1, 1948 to correct the difficulty (R. 84). The District Court so found (R. 573, Finding 6), as did the Court of Appeals (R. 607). Objects approaching within ½ mile radius could not be seen on the radar due to a white spot in the center of the scope and the entire picture on the scope would fade out (R. 84, 118).

The ARMSTRONG was equipped with a searchlight on top of her pilothouse (R. 97-98) and this light had been turned on with its rays directed upward before the vessel reached Colchester (R. 98). Neither the direction nor pitch of the light was changed thereafter (R. 100).

At 11:20 P. M. the ARMSTRONG was abreast Colchester Reef (R. 89, 108) on course 101° (R. 87, 205, 206).

About 11:35 P. M. (R. 116), the Steamer ELLWOOD, which was also downbound and some distance ahead of the ARMSTRONG (R. 90, 116) called the ARMSTRONG by radiotelephone and reported she had just met four upbound vessels, one right after the other, on the one whistle

side (port to port) and the ARMSTRONG would be seeing them shortly (R. 91, 146).

The ARMSTRONG was sounding fog signals regularly (R. 91, 94, 119, 209, 269) and could hear fog signals from vessels ahead (R. 91, 94) on the port side (R. 92, 279). The approaching vessels could be seen on the radar scope, one right after the other, in a line running parallel and to port of the ARMSTRONG (R. 94, 117).

When about one mile from the first of the four vessels, later identified as the SCHOONMAKER, the ARMSTRONG exchanged one blast passing signals with this vessel and hauled 5° to the right (R. 95). The two vessels passed port to port (R. 207) with the SCHOONMAKER about ½ mile to the northward (R. 95, 130), although she was not visible in the ARMSTRONG's radar because of the blot in the center of the scope (R. 100).

At that time the next three approaching vessels were seen on the radar and appeared to be in line (R. 96, 130, 209) with the leading vessel, the BOLAND, about one mile away (R. 130) and one point (11¼°) or two points on the port bow (R. 132). The ARMSTRONG was hauled 5° to the right to give the approaching vessels more clearance (R. 95, 130).

The ARMSTRONG blew a one blast passing signal to the BOLAND which was not answered (R. 96, 210, 280). This passing signal was repeated several times between the regular fog signals but was never answered by the BOLAND (R. 96, 119, 136, 210, 241, 280, 289). Fog signals from the BOLAND were heard distinctly by the lookout on the ARMSTRONG (R. 285), first about ½ point on the port bow and then widening to 3½ to 4 points (45°) on the port bow (R. 284).

Thereupon, at 11:15 P. M. the ARMSTRONG was checked to half speed ahead (R. 96, 109, 124, 136, 207, 211)

and the heading was changed to 115° (R. 67), then the wheel was put hard over to the right and the heading swung to about 127° (R. 97, 121, 134, 210). During the swing to the right the ARMSTRONG continued to blow one blast passing signals between fog signals but the BOLAND did not reply (R. 97, 119, 211, 242, 297). Only fog signals were heard from the BOLAND (R. 97, 212).

While the ARMSTRONG was proceeding under checked speed and her bow was swinging to the right, the beam of the light from another vessel was seen bearing about 21° or more on the port bow (R. 98, 212, 271, 281). That vessel could not be seen (R. 98) but she blew a two blast passing signal (R. 97, 271, 281) not more than one minute before the collision (R. 97, 281) which the ARMSTRONG answered with a danger signal (R. 98, 213, 281, 320). In fact, at no time did the ARMSTRONG blow a two blast passing signal (R. 99, 273, 281).

Then the bow of the BOLAND hove into view about 200′ away and bearing about 3 points on the port bow of the ARMSTRONG (R. 99, 212, 281). The ARMSTRONG was backed full speed astern (R. 99, 212, 213) and the wheel was put hard right (R. 212, 273).

The BOLAND was coming fast (R. 99, 213) and her stem struck the port bow of the ARMSTRONG about 15′ abaft her stem, at an angle of about 45° (R. 99, 102, 213) penetrating the ARMSTRONG for approximately 12′ to 15′ (R. 100, 214).

The collision occurred at approximately 12:03 A. M. November 2 (R. 70). The ARMSTRONG continued to back as she swung to the right and the vessels separated in the fog (R. 100). Thereafter, the ARMSTRONG tried unsuccessfully for ½ to ¾ of an hour to communicate with the BOLAND by radiotelephone (R. 101, 135, 216).

As a result of the serious damage suffered by the ARMSTRONG, her forepeak was full of water and her bulk-

head was buckled (R. 235, 236) and leaking (R. 102, 234, 292) and she was going down by the head (R. 102). Thereafter the ARMSTRONG, having turned around, proceeded back to the shallow water at Bar Point (R. 101).

4. Disinterested Testimony.

There was testimony from witnesses on vessels in the general vicinity of the collision; the ISAAC L. ELLWOOD, the ALEXANDER LESLIE, the CHARLES A. PAUL, the MYRON C. TAYLOR and the JAMES M. SCHOONMAKER. The extent to which such disinterested testimony was of assistance is set forth in the opinions of the Courts below. Since both Courts expressly relied on the testimony of the master of the Steamer ISAAC L. ELLWOOD, we summarize his testimony herewith:

The Steamer ISAAC L. ELLWOOD was proceeding down the Lake ahead of the ARMSTRONG and after passing Colchester at 10:07 P. M. she steered a course of 103° for Middle Ground Light (R. 141). At 11:07 P. M. she checked to half speed ahead (R. 145) because she was meeting four vessels substantially in line about one mile apart (R. 143, 144) on her port side (R. 143). These vessels were very close to the northerly sailing line on libellant's Exhibit 6 (R. 143).

All four of the upbound vessels passed the ELLWOOD port to port at 700′ to 900′ off (R. 144) after exchanging one blast passing signals. The first vessel, the SCHOONMAKER, was passed (R. 143) and the second vessel in line, the BOLAND, was passed 3½ miles to 4 miles west of Pelee Passage Light (R. 144). The last vessel was passed at 11:40 P. M. (R. 144) and the ELLWOOD, then being 1½ miles from Middle Ground (R. 146), called the ARMSTRONG, which was astern, and advised her that she would be meeting four vessels in line (R. 146). The four vessels

appeared to be proceeding at practically the same speed (R. 152).

About 12:10 A. M. November 2, the ELLWOOD learned of the collision between the ARMSTRONG and the BOLAND and heard the ARMSTRONG make several calls to the BOLAND which were unsuccessful (R. 147).

5. Conclusion of the Trial Court.

The District Court found that the ARMSTRONG's radar was out of order or not working dependably (R. 574, Finding 6).

The District Court found the ARMSTRONG was negligent in its failure to check its speed, to blow danger signals, or to take necessary precautions when its one blast passing signals were unanswered (R. 574, Finding 7).

The District Court further found the BOLAND was negligent in going at too great a speed under the foggy conditions and in failing to take necessary precautions because of her converging course (R. 574, Finding 8).

The District Court found that each vessel failed to adopt the required precautionary measures by way of signals and checking before emergency action was necessary (R. 574, Finding 9).

The Court concluded as a matter of law that the case was governed by United States law, that therefore the equal division rule of damages was applicable, and that the vessels were equally at fault for the collision and should share the damages equally (R. 574-5).

In its memorandum opinion the District Court stated that its finding and conclusions would be the same even if Canadian law applied (R. 572). The Court further stated that little of the evidence from the respective vessels as to location and signals could be reconciled with the physical facts (R. 568, 569), that the testimony of the

BOLAND as to her location was impaired by the disinterested testimony from the Steamer ELLWOOD (R. 569) and that the testimony of the ARMSTRONG as to courses, signals, navigation and locations more nearly approached the truth (R. 572).

6. Conclusion of the Court of Appeals.

The unanimous affirming opinion of the Court of Appeals (R. 603-609), rendered after "a most painstaking study of the record" includes the following findings and conclusions:

a. The BOLAND, hearing fog signals off its starboard bow was at fault in failing to reduce her speed to steerageway (R. 607);

b. The BOLAND failed to alter course or reduce speed even though her master actually knew the vessel was in a dangerous situation (R. 607);

c. The BOLAND failed to take the precaution of seasonably lighting her searchlight and pointing it skyward as the ARMSTRONG had done (R. 607);

d. The ARMSTRONG was at fault in not reducing speed to bare steerageway and to navigate with caution after receiving no response to its one blast passing signal (R. 606-7);

e. The ARMSTRONG's radar was not functioning dependably (R. 607);

f. Both vessels were at fault to an equal degree and, therefore, it was unnecessary to decide whether recovery should be governed by Canadian or American law (R. 608);

g. No error could be perceived in the findings and conclusions of the Trial Court (R. 609).

ARGUMENT.

1. Since petitioner ignores the faults found against the BOLAND, no basis is presented for review of the finding that the vessels were equally at fault.

Comparison by the District Court and the Court of Appeals of the faults found against the BOLAND and ARMSTRONG respectively was purely a finding of fact. In the absence of a very obvious and exceptional showing of error there is no basis for review in this Court of concurrent findings of fact by two courts below. *Graver Mfg. Co. v. Linde Company,* 336 U. S. 271. This rule is applicable in admiralty cases. *The Carib Prince,* 170 U. S. 655; *The Wildcroft,* 201 U. S. 378. Especially is the rule applicable in fog collisions "where it is so seldom possible to come to any certain conclusions as to the speed and positions of the vessels." *United New York Sandy Hook Pilots Ass'n. v. Den Norske, etc.,* 121 F. (2d) 304, 305 (C. A. 2—1941), certiorari denied 314 U. S. 684.

Petitioner requests a review of the judgment below on the ground that the evidence of the ARMSTRONG alone shows her to have been guilty of gross and glaring negligence (Petition pp. 2-3). Nowhere in its brief does petitioner dispute the findings of fault against the BOLAND or attempt to minimize their fundamental seriousness. Therefore, even if this Court should find that the negligence of the ARMSTRONG was gross, such a characterization would be meaningless unless comparison was made with the character of the faults found against the BOLAND. Petitioner in ignoring the faults of the BOLAND denies this Court any basis for making such a comparison and, therefore, under the "two court rule" petitioner presents no basis for review.

2. The faults of the BOLAND were fundamental and serious.

The District Court found that the BOLAND was negligent in going at too great speed under the foggy conditions and in failing to take necessary precautions because of her converging course (R. 574, Finding 8), and that she failed to take necessary precautions by way of signals or checking prior to the time for emergency action (R. 574, Finding 9). The Court of Appeals adopted and particularized these findings, holding that the BOLAND was at fault for failing to reduce her speed to bare steerageway upon hearing fog signals ahead (R. 607), especially when her master knew that danger existed (R. 607), and that she was at fault for neglecting the prompt use of her searchlight (R. 607).

The Court of Appeals said (R. 607):

> "One bit of evidence, it seems to us, speaks eloquently of the BOLAND's fault * * * (The wheelsman testified): 'well, yes, Capt. Monroe (master of the BOLAND) blew and after the second set was blown Capt. Monroe said, *'thank God, we're by him.'* This observation points to the apprehension of Capt. Monroe that he was in a dangerous situation. How long before he had sensed the danger is impossible to say except that it must have been several minutes before the crash, in view of his evidence that he blew three passing signals, interspersed with repeated fog signals, minutes apart. Thus, conscious of danger, Capt. Monroe failed to alter his course or check his speed until he observed the range lights of the ARMSTRONG and collision could not be avoided."

The BOLAND's failure to make her location known by prompt use of her searchlight was a violation of the general precautionary rule, Rule 28, *supra*.

The BOLAND's immoderate speed in fog was a violation of Great Lakes Pilot Rule 15, *supra. The Colorado,* 91 U. S. 692 (1875) (5 to 6 miles per hour excessive); *The George W. Roby,* 111 F. 601 (C. A. 6—1901), certiorari denied 183 U. S. 699 (4 to 6 miles per hour excessive); *The Alberta,* 23 F. 807 (D. C. E. D. Mich.—1885) (6 miles per hour excessive).

The BOLAND's failure "at once" to reduce her speed to bare steerageway upon hearing the fog signals of the ARMSTRONG "not more than four points from right ahead," and her further failure to sound a danger signal and stop and reverse when her master actually knew of the danger ahead, were violations of Rule 15 and Rule 26, *supra. The North Star,* 62 F. 71 (C. A. 6—1894); *The George W. Roby, supra.*

These *statutory* violations of the BOLAND prevent any application of the "major and minor fault rule" in her favor, for as a result of such statutory violations it must be presumed, as two courts found to be the fact, that her faults, if not the sole cause, were of major importance in contributing to the collision. The rule of presumption and burden of proof arising from statutory fault is stated in *The Pennsylvania,* 19 Wall. 125, 136 (1873) as follows:

> "But when * * * a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributing cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault *might not* have been one of the causes, or that it probably was not, but that it *could not* have been. Such a rule is necessary to enforce obedience to the mandate of the statute." (Emphasis supplied.)

If all other faults of the BOLAND were arbitrarily excluded, her failure to reduce to bare steerageway upon

hearing the fog signals of the ARMSTRONG ahead, would be sufficient to render her equally at fault with the ARMSTRONG. In *Lie v. San Francisco and Portland Steamship Co.*, 243 U. S. 291 (1917), the BEAVER was found "palpably" at fault for her excessive speed in fog and the SELJA was found at fault for her failure to stop upon hearing the fog signals of the BEAVER ahead. The SELJA was going at half speed of 6 knots when she heard the fog signals of the BEAVER 16 minutes before collision. 11 minutes before collision she reduced speed to 3 knots. 6 minutes before collision she stopped her engines, and 2 minutes before collision she was nearly at a stand-still. It was argued that the negligence of the SELJA, if any, was a remote and not a proximate cause of the collision. The Court in rejecting this contention said at p. 296:

"Of these rules the following is applicable to the case we are considering:

> 'Art. 16. Every vessel shall, in a fog, mist, falling snow, or heavy rain-storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.
>
> 'A steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

"The most cursory reader of this rule must see that while the first paragraph of it gives to the navigator discretion as to what shall be 'moderate speed' in a fog, the command of the second paragraph is imperative that he shall stop his engines when the conditions described confront him. The difficulty of locating the direction or source from which sounds proceed in a fog, renders it not necessary to dwell upon

the purpose and obvious wisdom of this second paragraph of the rule."

And at p. 298:

"* * * the effect of the wilful disobedience of this imperative and important statutory rule of law, which should have governed his conduct, continued as an effective force, operating on the movement of his vessel to the instant of collision, driving her forward steadily, even though in the last moments slowly, to the fateful point of intersection of the courses of the two ships.

"Such a state of fact makes sharply applicable the conclusion of this court in The Pennsylvania, 19 Wall. 125; * * *"

The Court further held that the major-minor fault rule could not be applied in favor of the SELJA, saying at p. 299:

"The case is not one for the application of refinements as to what would have been good seamanship without the rule, such as we are invited in argument to consider, nor is it a case for consideration of the doctrine of major and minor fault. Both of the masters were palpably negligent in respects which contributed directly to cause the collision; the negligence of each continued to operate as an efficient cause until the moment when the accident occurred, and we agree with the lower courts that the case is one in which the master and owner of the 'Selja' must be left to suffer their self-inflicted loss."

In the *Lie* case, *supra*, the SELJA stopped her engines 6 minutes before collision and was condemned equally with the BEAVER. Petitioner's vessel, the BOLAND, long after the fog signals of the ARMSTRONG were first heard, continued on at the same speed until her master actually saw the ARMSTRONG close ahead and she was about to plow into the ARMSTRONG's bow (R. 337, 370). The Courts

below were correct in condemning the BOLAND for her statutory faults.

3. Uniformity of decision is not disturbed by the Findings below.

a. Radar.

The cases cited in petitioner's brief (p. 17) are readily distinguishable since presumably the radars involved in those cases were operating efficiently and could be relied upon. Although mechanics had recently been aboard to correct the difficulty, a white spot persisted in the center of the ARMSTRONG's radar scope which blotted out all objects within one-half mile of her position. The ARMSTRONG's radar was not functioning dependably and both courts so found (R. 573, Finding 6; R. 607).

b. Stand-by Rule.

There is no substance to petitioner's contention at p. 18 of the petition that the Stand-by Rule is applicable to this case. The evidence shows that after the BOLAND had rammed the ARMSTRONG the vessels separated and lost each other in the dense fog. The ARMSTRONG's stem had been penetrated 12′ to 15′ (R. 100, 214), her windlass room was jammed in, her collision bulkhead was leaking (R. 235-236), her forepeak was full of water (R. 102), she was going down by the head (R. 101-102) and her crew were at their abandon ship stations (R. 136). In these circumstances the ARMSTRONG remained at the scene for a considerable period attempting to communicate with the BOLAND by radiotelephone (R. 101, 135). Not until the ARMSTRONG heard that the Steamer J. P. WELLS was going to the assistance of the BOLAND did the ARMSTRONG leave the scene to seek safe anchorage (R. 135). Certainly the

ARMSTRONG did all that reasonably could be expected of her and she was justified in then seeking a safe anchorage.

c. Alteration of Helm.

Nor is there any substance to petitioner's statement at p. 3 of the petition that the Court of Appeals condoned the ARMSTRONG's changes in course contrary to the authority of controlling decisions. The master of the ARMSTRONG, from his radio conversation with the ELLWOOD, had reasonable grounds for believing that the SCHOONMAKER, BOLAND and the two following vessels were all in line on his port hand. Indeed, both courts found that the BOLAND took her departure on the course to Toledo well beyond the usual turning place at Middle Ground (R. 569, 605-6) so that for a considerable time during the approach of the two vessels the BOLAND was on the Colchester course; that is, the reverse of and parallel to the course of the ARMSTRONG. Therefore, the master of the ARMSTRONG was exercising reasonable precaution when he ordered the vessel to the right before and after passing the SCHOONMAKER. *The Umbria*, 166 U. S. 404; *The Munrio*, 11 F. (2d) 900 (D. C. N. D. Cal.—1926); *Dollar S. S. Line v. Matson Nav. Co.*, 23 F. (2d) 554 (C. A. 9—1928).

But the Court of Appeals did not condone the ARMSTRONG's navigation after she received no reply to her one blast whistles to the BOLAND.

The Court said (R. 606-607):

> "When the ARMSTRONG received no response to its one blast passing signals, if they were blown, it was at fault in not reducing its speed to bare steerageway and to navigate with caution."

This finding of fault cast in terms of what the ARMSTRONG *should have done* under the Pilot Rules, was obviously a condemnation of what she *did do*. The decisions

cited by petitioner at pp. 14 to 16 of its brief differ only in emphasis, not in principle, from the lower court decision in the instant case. This is obvious from petitioner's quotation at p. 15 of its brief from *The Alberta*, 23 F. 807, where the duty is both affirmatively and negatively stated. The Court said:

> "It is one of the elementary rules of navigation that a vessel ought never to alter her helm in ignorance of the position and course of an approaching vessel. * * * Instead of experimenting, it is her duty to stop, and sometimes to reverse."

Furthermore, in *The North Star*, 62 F. 71 (C. A. 6—1894), cited at p. 14 of petitioner's brief, the characterization of the faults of the SHEFFIELD as "reckless" and "gross" as compared to the faults of the NORTH STAR, was made at a time when the faults of the latter vessel were measured by a less exacting standard than now exists. The NORTH STAR was found at fault for violation of Rule 21, Sec. 4233 R. S., which provided as follows:

> "Every steam vessel, when approaching another vessel so as to involve risk of collision, shall slacken her speed, or if necessary, stop and reverse; and every steam vessel shall, when in a fog, go at a moderate speed."

In regard to the duty of the master to slacken speed, the Court at p. 77 construed Rule 21 according to its terms but added the following proviso:

> "* * * unless such circumstances present themselves to him at the time as would lead a reasonably prudent and skillful navigator to the confident belief that no risk of collision exists."

In 1895 Rule 21 was superseded by Rules 15 and 26, *supra*. The duty to stop and reverse was no longer subject to qualification by the reasonable judgment of the navi-

gator but was made absolute. Regardless of the distance separating the two vessels, the master of one vessel hearing the fog whistle of another ahead is imperatively required "at once" to stop and reverse. *The George W. Roby*, 111 F. 601 (C. A. 6—1901), certiorari denied 183 U. S. 699, *supra*. See *Lie v. San Francisco and Portland Steamship Co.*, 243 U. S. 291 (1917) *supra*.

In addition to the BOLAND's failure to reduce speed upon hearing the fog signals of the ARMSTRONG ahead, the Court's below also convicted the BOLAND of further statutory faults which were of a fundamentally grievous nature; immoderate speed in fog; failure to sound a danger signal, stop and reverse when her master actually knew that danger of collision existed; and failure to use her searchlight to aid the approaching ARMSTRONG.

It is immediately apparent that the faults of the BOLAND were not only more numerous but more flagrant than were the faults found against the NORTH STAR in the case of *The North Star, supra*.

Other faults might well have been found against the BOLAND. For example, the District Court suggested that the BOLAND's dilatory shaping of course to Toledo (R. 569-570) made her insistence upon a starboard to starboard passing "gross negligence" (R. 570). See *The Loomis*, 86 F. (2d) 705, 707 (C. A. 2—1936). If the BOLAND had promptly taken the Toledo course at Middle Ground or had advised the ARMSTRONG by radiotelephone that her taking of the Toledo course was delayed, there would have been no collision.

CONCLUSION.

Petitioner, by ignoring the faults of the BOLAND, thwarts any comparison by this Court of the faults which were found or which might have been found against the vessels by the Courts below. Furthermore, petitioner fails to present for ultimate decision any novel question of law or conflict of decision. Certainly there is no question of national importance or public interest involved.

It follows, therefore, that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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